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No. ~~264~~

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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S REPLY TO THE SINGLE BRIEF OF THE FIVE CORPORATE LESSEES LEMONT MFG. CORP. ET AL.

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Petitioner incorporates herein his Reply Brief forwarded on October 8, 1971 to the Brief on behalf of a single respondent American Oil Company, which was transmitted on October 8, 1971. A number of the contentions in Respondents two Briefs are similar, if not identical, in character. It is of course not necessary to respond to each argument in Lemont's brief.

The District Court dismissed Petitioner's complaint largely upon the theory that the Illinois special in-

jury rule barring the access to the Illinois courts by 99% of the District's taxpayers did not conflict with either the due process or equal protection clauses. The court further held that the application of the equal protection clause would "force state courts to entertain the most remote taxpayers complaints without limit." (304 F. Supp. at page 37, App. 9.)

The Court of Appeals affirmed, though in the interval the special injury rule, the primary basis of Petitioner's defeat in the state courts was repudiated. (See *Paepcke* decision, App. 36, 267 NE 2nd 11-18.) Notwithstanding the bearing of the *Paepcke* case to Judge Robson's opinion and that of the Illinois courts was the Court of Appeals in its own unique opinion still found it possible to hand respondent corporations an enormous victory and the public a more devastating defeat.

The Court of Appeals in the light of the demise of Defendants' special injury principle should have exhibited some skepticism as to the validity and soundness of the other similar claims of all the Respondents. The Kerner opinion merely approved their arguments without evidence that it seriously considered our Briefs or the controlling decisions of this Court.

I. RESPONDENT'S RESTATEMENT OF THE CASE (pp. 1-5)

Respondents have improperly criticized Petitioner's statement of the case which complies with Rule 23 1(e). Unfortunately the judicial opinions in this case have overlooked the duty of federal courts in constitutional public interest litigation for they represent little more than the acceptance of Respondent's one-sided cursory version of the facts. In *England* v. *Louisiana Board,* 375 US 411, 416, 417:

> " 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend* v. *Sain*, 372 US 293, 312 . . . 'There is always in litigation a margin of error representing error in factfinding. . . .' *Spieser* v. *Randall*, 357 US 513, 525."

The opinions below do not represent "a fair assessment of the record. *FTC* v. *Standard Oil Co.*, 355 US 396, 398." (See App. 51-53.)

II. REASONS FOR GRANTING THE WRIT

Disqualification of Judge Kerner (pp. 6-9)

Because of the interrelation of Judge Kerner's disqualification to other intervening matter we are discussing it at the conclusion of this reply.

II. Petitioner's Jurisdictional Claims (pp. 9-18)

1. Respondents Confuse Issue as Involving Only Leasing of Municipal Real Estate at Inadequate rentals.

Respondents apparently admit the Court below misunderstood the issue for they say (p. 9)

> "Essentially, the lower courts held that the nature of petitioner's complaint—dissatisfaction with the financial returns on leases of municipal real estate—did not fall within the limited subject matter jurisdiction of the federal district courts."

However, subsequently they agree the issue involves "taxpayers' actions challenging the legality or propriety of conveyances or leases of municipal real estate".[1] Moreover they have persistently as have both federal courts (with the exception of Judge Will) totally ignored the nature of the property interests held by taxpayers in

[1] (P. 11)

public land. It has been universally accepted as representing such a substantial property right as to support the right to access to the courts to protect such rights (Petition pp. 24, 25) (App. 10-17, 21, 22, 69-72)

The inconsistency of Respondent's arguments and the Court of Appeals opinions is illustrated here as elsewhere. For years Respondents argued in the state courts that they lacked any property interest justifying their access to the Illinois courts on any theory. These contentions were contrary to the view of state courts throughout the nation (App. 69-72, Petition 24, 25.)

Res Judicata and Collateral Estoppel Claims And Rulings Should Be Overruled (pp. 12-15).

Angel v. *Bullington,* 330 U.S. 183, 189-190 (1947) *Is Not "Precisely In Point."* (Lemont pp. 12-15)

The rule governing all constitutional jurisdictional and in fact all cases in this Court require that federal decisions be predicated not upon a single isolated fact but upon all relevant factors in each case. In this case the Court of Appeals was duty bound in 1971 to consider the following controlling factors which did not exist in the *Angel* case rather than blindly adopt Respondent's claims *C.I.R.* v. *Sunnen,* 333 U.S. 591, 600, 601.

(a) Petitioners claim the state judgment was invalid and lacked due process and Judge Will's ruling a factual hearing should be held upon it. (App. 22)

(b) The earlier District Court and Court of Appeals' decisions in *General Dynamics* justifying the filing of Petitioner's Lemont suit in the federal courts. (App. 10-23)

(c) The refusal of the Illinois Supreme Court in *Droste* v. *Kerner,* 217 NE 2d 73, 79, 385 US 465 (1967) (App. 37)

to abandon the special injury rule and particularly since such action was contemporaneous with the Appellate Court rule in Petitioner's state court case.

(d) Judge Kerner's relation as Governor to *Droste* v. *Kerner*. (Petition 11-15)

(e) The abstention principles including decisions of this court in *England* v. *Louisiana Bd.*, 375 U.S. 411 (Petition 23, 24).

(f) The intervening change in the Illinois rule as a result of the *Paepcke* decision (*Paepcke* v. *P.B.C. et al.*, 263 NE App. 36) repudiating the special injury principle underlying it had been the governing principle underlying earlier state and federal decisions.

The recourse to the federal courts rather than representing "a flagrant attempt at piecemeal litigation" was the only proper course Petitioner could undertake in view of the conduct of the Defendants and the above factors.

Intervening Change In Special Injury Rule Required Reversal

The intervening change in the special injury rule constitutes a repudiation of the basic legal principles argued by the Defendants in the state and federal courts, yet Respondents insist that this very repudiation is intended to constitute the basis for their victory in this Court and in the Court of Appeals. This Court has consistently ruled otherwise: *Bryan et al.* v. *Austin*, 354 U.S. 933; *Butler* v. *Eaton*, 141 U.S. 240, 242, 243; *Duke Power Co.* v. *Greenwood*, 229 U.S. 259, 267, 268; *U. S.* v. *Munsingwear*, 340 U.S. 36, 39, 40; *C.I.R.* v. *Sunnen*, 333 U.S. 591, 597.

Other Contentions

The claim (page 14) that Petitioner's attack upon the special injury rule is devoid of merit ignores: (a) the fact that practically every state in the Union where the issue has been litigated upheld taxpayers' suits to safeguard rights in public land upon the same theory that taxpayers suits were justified to prevent misuse of public funds. (App. 69-72, Petition 15-19, 24, 25). The refusal of the states generally to apply the old Illinois rule and the Illinois Supreme Court's belated repudiation of *Droste* v. *Kerner* demonstrates the irrationality and arbitrary character of the classification which these and other corporate Defendants imposed upon the Illinois Courts and Judge Robson.

Equally without merit is their claim (p. 13) that the District taxpayers could not contend that the special injury rule violated the equal protection and due process clauses. Petitioner did exactly what hundreds of other litigants have done who have contested the invalidity of state action as contrary to these clauses. Moreover, this contention apparently accepted by Judge Kerner (App. 440 F. 2nd, 388 fn. 4), discloses the improper application of the estoppel principle.

Section 1343(3) Can be Invoked Where as Here the Suit Involves a Combination of Personal and Property Rights (pp. 15-17)

Respondents ignore the substantial difference of opinion between the Kerner decision and that of other courts which upheld jurisdiction under 1343 presenting a combination of procedural due process or equal protection and property rights.[1] (Petition 15-19). *Escalera* v. *New York City Hous-*

[1] They also overlook the assumption in the Kerner opinion that Petitioner had showwn the special injury rule established jurisdiction. (440 F.2d at p. 388 App. 4)

ing Authority, 425 F. 2d 853, 864 (CA 2, 1970); *Dale* v. *Hahn,* 440 F. 2d 633, 636 (1971) CA 2, and *Cipriano* v. *Houma,* 395 U.S. 701, 702 ff; *Phoenix* v. *Kolodziejski,* 26 L. Ed. 2d 523, 527. (Petition 17-19). The Seventh Circuit in *Ream* v. *Handley,* 359 F. 2d 728, 731, relied upon in the Court's opinion, holds 1343 does not apply "where a person seeks only to protect property or monetary rights."

We have earlier demonstrated ~~that we~~ were denied procedural due process and equal protection of the laws under the special injury rule which justified invoking the jurisdiction of the federal courts. (Petition 15-19.) The personal right Petitioner sought to sustain also was directly at the restoration of the dignity and substance of honest and efficient government. One purpose of the suit was the restoration of public confidence in a government which assures public protection against private corporations who by conduct tatntamount to fraud are permitted to take possession and obtain the exclusive benefits of valuable public lands.

Respondents have also failed to call this Court's attention to federal court rulings refusing to entertain an action where, as here, a state has denied a large class of its citizens access to its courts, under the equal protection and due process clauses. As evidence of the federal court's willingness to sustain jurisdiction under 1343(3) the Second Circuit decided *Dale* v. *Hahn,* 440 F. 2d 633 (1971) on February 19, 1971 (note *Lemont* at 440 F. 2d 385).

That court followed the rule that jurisdiction under 1343(3) must be sustained whenever a combination of property and personal rights were presented. There, unlike here, the absence of due process procedure was considered relevant. Here, also, there are significant personal consequences, but by the alleged fraudulent acts under which the lessees acquired the District's public property. The

stigma of inability of individual citizens and the taxpayers as a group to safeguard their interest, the denial of access to the courts create "a stigma of incompetency" accepted in *Dale.*

In *Escalera* v. *N. Y. City Housing Authority,* 425 F. 2d 853, (1970) the court declared:

> ". . . the instant actions allege deprivations of procedural due process, a civil right, which may ultimately lead to the loss of a property right, to wit, tenancy in public housing projects. . . ."

Our allegations demonstrated clear violations of procedural due process and the equal protection clause.

Judge Kerner Was Disqualified.

We reject Lemont's argument that the governor of Illinois during 1961-1968 serves in a mere nominal capacity on the vital public issues including (a) the right of Illinois citizens to independently have recourse in the state's courts to safeguard their rights in public land resources; (b) the measures undertaken by the state itself to protect such interest against large and unscrupulous private corporations. A governor who is only a nominal figure with respect to these issues either is abandoning the public interest and is subservient to such corporations. However, Kerner could not escape responsibility for the State's policies in these areas. The Sanitary District then and (like his own today) represented the major political scandal in the state. As he participated in the approval of public land grants by signing his name to the legislative bills, *Droste* v. *Kerner,* 217 N.E.2d 73, 74, and then opposed in the state and federal courts the right of citizens to independently safeguard their interests he was duty bound to retire in the instant case when it came before the Court of Appeals.

Intervening events since the Court of Appeals rulings have demonstrated that Petitioner was correct in contending Judge Kerner was obligated to excuse himself in this case. The undisputed facts disclose that he as an insider made large secret profits in investments in racing corporations under the direct control of his appointees. It also appears that these corporations benefitted largely by additional rights granted to them by both administrative and legislative acts before and after the Governor in 1966 and 1967 engaged in these secret transactions. The probability of secret personal profits reveals that his participation and writing of the Court of Appeals' opinion lacked considerably more than the appearance of justice. (*In re Murchison,* 349 U.S. 133, 136.)

CONCLUSION

Petitioner prays that this Honorable Court grant this Petition and reverse the judgments below.

Rspectfully submitted,

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